SUPREME COURT, U. S.

No. 1129

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

In the Matter of
DIVERSIFIED DEVELOPMENT CORPORATION,
a Corporation,
Debtor.

DIVERSIFIED DEVELOPMENT CORPORATION,
a Corporation, HERMAN WILKENING and
ALICE WILKENING,
Petitioners,

vs.

SECURITY TRUST COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
for the Seventh Circuit.

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SECURITY TRUST COMPANY, a Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Seventh Circuit.

Petitioners pray that a writ or writs of certiorari be issued to review two judgments entered by the United States Court of Appeals for the Seventh Circuit: (1) a judgment entered February 4, 1965, in a cause in that Court entitled "In the Matter of Diversified Development Corporation, Debtor; Diversified Development Corporation, Herman Wilkening and Alice Wilkening, Appellants v. Security Trust Company, et al., Appellees," and numbered

14648; and (2) a judgment entered April 5, 1965, in a cause named the same but numbered 14886.

Both causes involve the same question, i. e., whether the appellee Security Trust Company holds a valid claim. The cause numbered 14648 in the Court of Appeals determined that the claim was valid so as to sustain a petition for involuntary reorganization of the debtor corporation based upon it; the cause numbered 14886 in the Court of Appeals determined that the claim was valid so as to sustain its allowance against the assets of the debtor corporation. These determinations were made as against identical objections by the debtor corporation and two of its principal shareholders (the petitioners here), and the present petition presents an identical issue as to both cases. Petitioners refer to Rule 23 (5) of this Court as authority for joining both proceedings in this single petition.

(a)

OPINION BELOW.

The opinion of the Court of Appeals in No. 14648 is reported in 341 F. 2d 58. It is set forth as an appendix to this petition. No opinion was filed in No. 14886. It was conceded below that the same ruling made in No. 14648 was determinative of No. 14886, and the Court of Appeals, on motion of the appellee Security, simply entered a judgment, without a formal opinion.

(b)

GROUND OF JURISDICTION OF THIS COURT.

(i) The dates of the judgments sought to be reviewed are February 4, 1965, and April 5, 1965, respectively.

(ii) No rehearing was sought in either case.

(iii) The statute believed to confer jurisdiction to review the judgments by writ of certiorari is Tit. 28, U. S. C., § 1254 (1).

(c)

QUESTION PRESENTED.

A Missouri banking corporation engages in the banking business in the State of Illinois. This is against the public policy of the State of Illinois, the statutes of which absolutely prohibit the issuance of a license to do banking business to a foreign banking corporation. The Missouri banking corporation, in Illinois, loans an Illinois corporation a sum of money and takes from the borrower Illinois corporation a mortgage on Illinois real estate as security for the debt. The Illinois borrower corporation defaults. The Missouri banking corporation begins actions in Illinois state courts to foreclose the mortgage and recover its loan. The Illinois borrower corporation resists on the ground that the Missouri banking corporation is not a qualified foreign corporation. The Illinois state courts rule against the Missouri banking corporation, not only dismissing the efforts to foreclose and collect but rendering final judgment in bar on the ground that the Missouri banking corporation could never qualify to do business in Illinois.

The question is, *Under the circumstances described, does the Missouri banking corporation, within federal bankruptcy law, have a valid and lawful claim to the extent that it may (1) join in a suit to subject the Illinois borrower corporation to involuntary reorganization under the bankruptcy law, (2) seek and obtain from the federal bankruptcy court an injunction staying the state actions which it had itself begun, and (3) urge in the bankruptcy court and secure allowance as a claim against the estate of the Illinois corporation the indebtedness which it unsuccessfully prosecuted in the Illinois courts?*

(d)

STATUTES INVOLVED.

The statutes involved in the case are statutes of the State of Illinois, in words and figures as follows (citations are to official publication; Smith-Hurd annotation references are the same):

Ill. Rev. Stat., Ch. 16½, § 106: "No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state or country any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business."

Ill. Rev. Stat., Ch. 32, § 157.102 (in part): "A foreign corporation organized for profit, before it transacts business in this State, shall procure a certificate of authority so to do from the Secretary of State. A foreign corporation organized for profit, upon complying with the provisions of this Act, may secure from the Secretary of State a certificate of authority to transact business in this State, but no foreign corporation shall be entitled to procure a certificate of authority under this Act to act as trustee, executor, administrator, administrator to collect, guardian, conservator, or in any other like fiduciary capacity in this State or to transact in this State the business of banking, insurance, suretyship, or a business of the character of a building and loan corporation. * * *"

Ill. Rev. Stat., Ch. 32, § 157.104 (in part): "No certificate of authority shall be issued to a foreign corporation: * * * (b) Which has as a part of its name any word or phrase which indicates or implies that it is authorized or empowered to conduct the business of banking, * * *."

Ill. Rev. Stat., Ch. 32, § 157.125 (in part): "No foreign corporation transacting business in this state without a

certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State, until such corporation shall have obtained a certificate of authority. Nor shall an action at law or in equity be maintained in any court of this State by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this State, until a certificate of authority shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets. The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action at law or suit in equity in any court of this State. * * *"

(e)

STATEMENT OF CASE.

Petitioners are an Illinois corporation Diversified Development Corporation (hereinafter sometimes referred to as Diversified), and two of its shareholders, Herman and Alice Wilkening. Respondent is a Missouri banking corporation, Security Trust Company (hereinafter sometimes referred to as Security). The judgment of the Court of Appeals of which review is sought affirmed a judgment of the District Court for the Southern District of Illinois which ruled, in substance and in effect, that Security held a valid claim against Diversified warranting Security in filing a petition for the involuntary reorganization of Diversified under Chapter X of the Bankruptcy Act. Petitioners have opposed the claim of Security as invalid.

Diversified was organized to construct a shopping plaza at Alton, Illinois, and for the purpose borrowed $800,000 from Security, giving a first mortgage to secure the loan.

The loan was made in Illinois, the security was land situated in Illinois, and the note and mortgage evidencing and securing the loan were executed in Illinois.

In December of 1962, dissension developed among Diversified's shareholders, and the City Court of Alton (an Illinois court of general jurisdiction) appointed a receiver for the corporation in January of 1963. In the meanwhile, Security's mortgage loan had become in default, and shortly after appointment of the receiver Security filed a foreclosure suit in the Circuit Court of Madison County, Illinois (also an Illinois court of general jurisdiction), at the same time petitioning for leave to intervene in the City Court action in order to seek leave to move to discharge the receiver.

The corporation resisted the foreclosure suit and the petition to intervene on the ground that Security, a Missouri banking corporation, was not a qualified foreign corporation and could not because of positive Illinois law become a qualified foreign corporation, and was, therefore, barred from the courts. Hearings were had at which evidence was adduced, and after briefs were filed and arguments heard final judgments were entered in both the receivership and foreclosure suits, denying intervention in the one and dismissing the other.

The judgments were entered February 6, 1964. They not only dismissed the petition to intervene and the suit to foreclose but, specifically pointing out that Security, as a foreign bank, could never qualify to transact Illinois banking business, went on to render final judgment against its claim.

The judgment in the receivership cause was as follows (App. Below, 20-22):

> Security Trust Company, a Missouri corporation, having filed herein its motion to intervene herein and

become a party hereto for the purpose of petitioning this Court for the removal of the receiver herein, and the defendants Diversified Development Corporation, an Illinois corporation, and Herman Wilkening having duly filed their objection to the intervention thus sought upon the ground, among others, that Security Trust Company has transacted business in the State of Illinios without having obtained a certificate of authority so to do, and is therefore forbidden to maintain any action at law or in equity in any court of this state under the express provisions of Ill. Rev. Stat., Chap. 32, § 157.125,

And said motion and objection having been duly called for hearing, and evidence, including the testimony of witnesses, having been duly received in connection therewith, and the parties having argued the matter to the Court and having submitted written briefs in support of their respective positions.

The Court, having considered the evidence, and the briefs and arguments submitted, and being fully advised in the premises, doth find:

1. The petitioning or moving corporation is a corporation duly organized and existing under the laws of the State of Missouri.

2. On and prior to March 28, 1962, and subsequent thereto, it did transact business within the State of Illinois.

3. It has never possessed a certificate of authority to transact business within the State of Illinois under the provisions of Ill. Rev. Stat., Chap. 32, § 157.102.

4. The motion for leave to intervene herein, and the petition sought to be filed if such intervention were allowed, would constitute the maintaining of an action in equity.

5. By virtue of Ill. Rev. Stat., Chap. 32, § 157.125, the petitioning or moving corporation

is not permitted to maintain such action in any court of this state.

And having so found, the Court doth now order, adjudge and decree that the objections of the defendants to the motion of Security Trust Company for leave to intervene herein be and they are hereby allowed and sustained, and that the motion of Security Trust Company for leave to intervene be and it is hereby denied.

And it further appearing to the Court that Security Trust Company is a corporation organized for the purpose of transacting the business of banking, and that under express statutory provision (Ill. Rev. Stat., Chap. 32, § 157.102) no certificate of authority may be issued to a foreign corporation to transact in Illinois the business of banking, the Court doth further find that the denial of leave to intervene herein cannot be cured or overcome by any action of the said Security Trust Company.

And it further appearing to the Court that Security Trust Company is a corporation organized for the purpose of transacting the business of banking, and that under express statutory provisions (Ill. Rev. Stat., Chap. 32, § 157.102) no certificate of authority may be issued to a foreign corporation to transact in Illinois the business of banking, the Court doth further find that the denial of leave to intervene herein cannot be cured or overcome by any action of the said Security Trust Company.

And having so further found, the Court doth now order and enter final judgment against the Security Trust Company, in bar of any claim of it in respect of this litigation, or the receiver herein, or the res in receivership herein, and for costs, with execution therefor; and the Court expressly finds that there is no just reason for delaying enforcement or appeal.

The judgment in the foreclosure suit was as follows (App. Below, 22-24):

> There having been duly filed herein the motion of the defendants Diversified Development Corporation and Wilkening to dismiss the complaint of the plaintiff herein upon the ground that the plaintiff, a corporation organized and existing under the laws of the State of Missouri, has engaged in the transaction of business within the State of Illinois without the obtaining of a certificate of authority so to do, and is therefore forbidden to maintain any action at law or in equity in any court of this state under the express provisions of Ill. Rev. Stat., Chap. 32, § 157.125,
>
> And said motion having been duly called for hearing,
>
> And evidence, including the testimony of witnesses, having been duly received in support of and in contravention of the allegations of the said motion,
>
> And the parties having argued the matter to the Court and having submitted written briefs in support of their respective positions,
>
> The Court, having considered the evidence, and the briefs and arguments submitted, and being fully advised in the premises, Doth Find:
>
> 1. The plaintiff is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri.
>
> 2. On and prior to March 28, 1962, and subsequent thereto, the plaintiff did transact business within the State of Illinois.
>
> 3. The plaintiff has never possessed a certificate of authority to transact business within the State of Illinois under the provisions of Ill. Rev. Stat., Chap. 32, § 157.102.
>
> 4. By virtue of Ill. Rev. Stat., Chap. 32, § 157.125, the plaintiff is not permitted to maintain an action at law or in equity in any court of this state.

And having so found, the Court doth now order, adjudge and decree that the complaint and suit of the plaintiff herein be Dismissed.

And it further appearing to the Court that the plaintiff is a corporation organized for the purpose of transacting the business of banking, and that under express statutory provisions (Ill. Rev. Stat., Chap. 32, § 157.102) no certificate of authority may be issued to a foreign corporation to transact in Illinois the business of banking, the Court doth further Find that the dismissal herein ordered cannot be action, in bar of the further prosecution thereof and for costs, with execution therefor; and the Court expressly finds that there is no just reason for delaying enforcement or appeal.

The entry herein of a final judgment against the plaintiff on the plaintiff's cause of action shall not terminate the cause as regards the claim of any person, firm or corporation, not otherwise barred by law, for having supplied labor or materials, or both, in the improvement of the premises described in the complaint herein, which said claim has been heretofore asserted in this cause by counterclaim or in some other manner. All parties defendant herein who may desire to oppose or contest any such claim are now granted 25 days after the date of this entry within which to file any motion or pleading opposing such claim, after which time such claim shall be set for disposition.

Following the entries of the judgments, Security (1) filed notices of appeal from the judgments to the Illinois Appellate Court, (2) joined two minor creditors of Diversified in a petition filed in the United States District Court to subject Diversified to involuntary reorganization, and (3) obtained an order from the United States District Court staying the appeal it had itself initiated from the adverse judgments to the Illinois Appellate Court. Di-

versified and its two principal shareholders, the petitioners here, challenged Security's right to act as a petitioning creditor by answers in the District Court. Their challenges, however, were denied by the District Court, which went on to enter a formal adjudication that the claim of Security was good and valid.

Petitioners then appealed to the Court of Appeals for the Seventh Circuit, and the cause became No. 14648 in that Court. It affirmed, and its judgment of affirmance is one of the two judgments review of which is sought by this proceeding.

In the meanwhile, Security had filed its claim in the reorganization bankruptcy estate. The petitioners here again resisted on the same ground that they had urged in resisting the participation of Security in the original proceeding. Again the District Court ruled against them, and again they appealed to the Seventh Circuit Court of Appeals, and this cause became No. 14886 in that Court. The Court of Appeals again affirmed (but filed no separate opinion, since the parties agreed that the issues were identical with those in No. 14648). This judgment of affirmance is the second of the two judgments sought to be reviewed by these proceedings.

(f)

[No review of a state court judgment is here sought.]

(g)

ORIGINAL BASIS OF FEDERAL COURT JURISDICTION.

The proceeding below originated as a petition for the involuntary reorganization of a corporation under Chapter X of the federal bankruptcy law.

(h)

ARGUMENT.

Fairly considered, Illinois law condemns the claim of Security as a nullity.

Security is and was as at all times a foreign (Missouri) banking corporation, not a foreign commercial, manufacturing or trading corporation.

The ordinary foreign commercial, manufacturing or trading corporation, by the clear terminology of the Illinois statutes, may overcome an objection that it has not qualified to do business in the state by accomplishing its qualification and paying its past-due fees. **Ill. Rev. Stat., Ch. 32, § 157.135:**

> "No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State, *until such corporation shall have obtained a certificate of authority.* [Emphasis supplied] * * *."

The bar is thereby removed. Thus it is possible, in the case of a non-qualifying commercial corporation, that it qualify even pendente lite, after it has been challenged, and so defeat the impediment. **Emcee Corporation v. George, 293 Ill. App. 240, 12 N. E. 2d 333, 335.** This avenue of resuscitation, found in the statutes of other states as well as those of Illinois, is, we submit, the basis of decisions holding that non-qualification of a foreign corporation will not defeat its claim against a bankrupt estate in a federal bankruptcy court. **In re V-I-D, Inc. [C. A.—7], 198 F. 2d 392, 394-395** (Indiana statutes); **In re Leeds Homes, Inc. [C. A.—6], 332 F. 2d 648** (Tennessee statutes).

But this is not the case with reference to a foreign banking corporation. By specific statutory provisions, it can never qual. .

"[N]o foreign corporation shall be entitled to procure a certificate of authority * * * to transact in this State the business of banking * * *."

Ill. Rev. Stat., Ch. 32, § 157.102.

"No certificate of authority shall be issued to a foreign corporation * * * which has as a part of its name any word or phrase which indicates or implies that it is authorized or empowered to conduct the business of banking."

Ill. Rev. Stat., Ch. 32, § 157.104.

"* * * No bank * * * shall establish or maintain in this State any branch office or regional agency for the purpose of conducting any of its business."

Ill. Rev. Stat., Ch. 16½, § 106.

Hence its tainted transactions can never be resuscitated; they remain perpetually unenforceable. They cannot be sued upon in a state court. **Ill. Rev. Stat., Ch. 32, § 157.125.** They cannot be sued upon in a federal court. **Woods v. Interstate Realty Co., 337 U. S. 535, 93 L. Ed. 1524.** They cannot be the subject of action by an assignee, or by the banking corporation's successor in an interest:

"* * * Nor shall an action at law or in equity be maintained in any Court of this State by any successor or assignee of such [foreign] corporation [doing business without authority] on any right, claim or demand arising out of the transaction of business by such corporation in this State, until a certificate of authority shall have been obtained by such corporation or by a corporation which has acquired all or substantially all its assets."

Ill. Rev. Stat., Ch. 32, § 157.125.

In short, any rights obtained by a foreign banking corporation in doing a banking business in Illinois in defiance of Illinois law are simply rights without remedy and as such no rights at all. **Woods v. Interstate Realty Co., 337 U. S. 535, 538, 93 L. Ed. 1524, 1527.**

In legal effect, if not in precise terms, this was the essence of the state court judgments pleaded below. The judgments held that Security had done business in Illinois in violation of the law, and therefore dismissed the suits; and then reciting that Security could never qualify so as to breathe life into the transaction, went on to render a final judgment in bar in each case:

> "And it further appearing to the Court that the plaintiff [Security] is a corporation organized for the purpose of transacting the business of banking, and that under express statutory provisions (Ill. Rev. Stat., Chap. 32, § 157.102) no certificate of authority may be issued to a foreign corporation to transact in Illinois the business of banking, the Court doth FIND that the dismissal herein ordered cannot be cured or overcome by any action of the plaintiff, and that this litigation, insofar as the suit and claim of the plaintiff [are] concerned, should be terminated, as provided in Ill. Rev. Stat., Chap. 100, § 45 (4). And having so found, the Court doth now order and enter FINAL JUDGMENT against the plaintiff and in favor of the defendants herein on the plaintiff's cause of action, in bar of the further prosecution thereof and for costs, with execution therefor." [These are the recitals and rulings in the foreclosure suit; those in the receivership are substantially the same.] See App. 22, 23-24.

These judgment are in full force. Security took appeals from them virtually concurrently with its institution of the Chapter X proceedings below, but immediately, without notice or hearing, sought and obtained inclusion in the district court's judgment orders a stay of the appeals, thus effectually halting the further consideration of the question that Security itself had sought. See App. 31-33.

The law which would deny a foreign bank the right to do banking business in Illinois under sanction of virtual forfeiture of its rights is concededly harsh; but it is the

only possible means of implementation of the settled public policy of the state. That public policy is evidenced by the following:

1. *The enactments of the state's legislature.*

Ill. Rev. Stat., Ch. 32, § 157.102: "[N]o foreign corporation shall be entitled to procure a certificate of authority * * * to transact in this State the business of banking * * *."

Ill. Rev. Stat., Ch. 32, § 157.104: "No certificate of authority shall be issued to a foreign corporation * * * which has as a part of its name any word or phrase which indicates or implies that it is authorized or empowered to conduct the business of banking."

Ill. Rev. Stat., Ch. 16½, § 106: "* * * No bank * * * shall establish or maintain in this State any branch office or regional agency for the purpose of conducting any of its business."

2. *The decisions of its courts.*

Boatmen's National Bank of St. Louis v. Hughes, 385 Ill. 431, 53 N. E. 2d 403, 405: "The establishment of branch banks has twice received the disapproval of the voters of this State by statewide referendums. No foreign bank, either State or national, is entitled to open a branch bank or an additional office in the State of Illinois, and, therefore, the petitioner [Boatmen's National Bank of St. Louis, Missouri] is not being discriminated against by a refusal to issue the certificate requested [a certificate authorizing it to do business in Illinois]."

3. *The declarations of its officials.*

The following opinions of Illinois Attorneys General are referred to:

Aikin (1899, page 93): "If branch banks of foreign corporations are to be tolerated in this State, there

should be an amendment to the statute providing therefor and fixing the terms and conditions upon which they may do business as a branch bank in this State."

Stead (1912, page 189): "Held, that the Auditor was without power to authorize a foreign banking corporation to establish a branch bank in this state; and expressed doubt of its right to do business in this state [as summarized by Barrett, 1938]."

Carlstrom (1929, Op. 2314): "I am of the opinion that a foreign bank [cannot] carry on the banking business in Illinois."

Lucey (1916, page 190): "The establishment of branches or agencies in this State of foreign banking corporations is contrary to the public policy of Illinois."

Barrett (1938, No. 42): Dealing with the question of a branch for a Canadian bank, but discussing the prior opinions noted.

The public policy indicated is not unusual, or peculiar to Illinois. **10 Am. Jur. 2d 287, 288 (§ 324, "Branch Banks").** It is interesting to note that Missouri, whence Security emanates, itself forbids branch banking. **State ex rel. Barrett v. First National Bank, 297 Mo. 397, 249 S. W. 619, 30 A. L. R. 918, affd. 263 U. S. 640, 68 L. Ed. 486.** "The banking business is so impressed with a public interest that it is subject to strict regulatory legislation." **Continental Illinois National Bank v. People's Trust and Savings Bank, 366 Ill. 366, 9 N. E. 2d 53, 56.** Accord: **People v. Wiersema State Bank, 361 Ill. 75, 197 N. E. 537; Knass v. Madison & Kedsie State Bank, 354 Ill. 554, 188 N. E. 836.** "Banks are indispensable agencies through which the industry, trade and commerce of all civilized countries and communities are carried on; the business which they transact, though for private profit, is of a pre-eminently public nature, and is therefore universally recognized as a proper subject of legislative regulation under the police power of the state." **7 Am. Jur. 30, § 9.**

"What claims of creditors are valid and subsisting obligations against the bankrupt at the time a petition in bankruptcy is filed is a question which, in the absence of overruling federal law, is to be determined by reference to state law." **Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 161, 91 L. Ed. 163, 165.** "* * * [E]xcept where federal law, wholly apart from bankruptcy, has created obligations by the exercise of power granted to the federal government, a claim implies the existence of an obligation created by state law. If there was no valid claim before bankruptcy, there is no claim for a bankruptcy court either to recognize or reject. * * * [N]o obligation finds its way into a bankruptcy court unless by the law of the State where the acts constituting a transaction occur, the legal consequences of such a transaction is an obligation to pay. See Bryant v. Swofford Bros. Dry Goods Co., 214 U. S. 279, 290, 291, 53 L. Ed. 997, 1002, 1003, 29 S. Ct. 614, 22 Am. Bankr. Rep. 111; Benedict v. Ratner, 268 U. S. 353, 69 L. Ed. 991, 45 S. Ct. 566, 6 Am. Bankr. Rep. (N. S.) 9; Security Mortg. Co. v. Powers, 278 U. S. 149, 73 L. Ed. 236, 49 S. Ct. 84, 13 Am. Bankr. Rep. (N. S.) 86." Ibid. [Concurring opinion of Frankfurter, Jackson and Burton, JJ., 329 U. S. 170, 91 L. Ed. 170.]

So a claim arising out of a transaction contrary to public policy cannot be proved and allowed in bankruptcy. **Collier (XIV Ed.), 1806 et seq.; In re Tichenor-Grand Co. [D. C.—N. Y.], 203 F. 720.** Gambling transactions cannot form the basis of an allowable claim. **In re Arnold [D. C.—Mo.], 133 F. 789; In re Aetna Cotton Mills [D. C.—S. C.], 171 F. 994.** The test is the law of the state wherein the transaction arose. **Bryant v. Swofford Brothers Dry Goods Co., 214 U. S. 279, 53 L. Ed. 997, 1002; In re Tichenor-Grand Co. [D. C.—N. Y.], 203 F. 720; Streeter v. Lowe [C. C. A.—1], 184 F. 263.** The bar of the state statute of limitations will defeat a claim in bankruptcy based on a transaction in that state. Collier (XIV) 1813 et seq.;

Matter of Povill [C. C. A.—2], 105 F. 2d 157; Matter of Deep Rock Oil Co. [D. C.—Okla.], 16 F. Supp. 777.

The adjudications against Security in the state court below are not mere interlocutory rulings on motions; they are final judgments, entered after the reception of evidence and extensive briefing and argument. This Court is, and the District Court below was, obligated by the law of the United States to afford them full faith and credit. **U. S. C., Tit. 28, § 1783 (formerly § 687); American Surety Co. v. Baldwin, 287 U. S. 156, 166, 77 L. Ed. 231, 237; Milwaukee County v. M. E. White Co., 296 U. S. 268, 273, 80 L. Ed. 220, 225; Lyders v. Peterson [C. C. A.—9], 88 F. 2d 9; Matter of Smith [C. C. A.—2], 36 F. 2d 697.** In the foreclosure suit, Security itself was the plaintiff; it invoked the state court's jurisdiction; and it would seem that having suffered an adverse judgment in effect holding void its claim it should be permitted to shake off the judgment and receive the blessing of the United States District Court as holding a valid, provable claim.

CONCLUSION.

Wherefore, petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit to the end that the judgments of the said Court herein referred to be reviewed.

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APPENDIX—OPINION BELOW.

In the
United States Court of Appeals
For the Seventh Circuit.

September Term, 1964—January Session, 1965.

No. 14648
In the Matter of Diversified Development Corporation, Debtor.

Diversified Development Corporation, a Corporation, Herman Wilkening and Alice Wilkening, Shareholders Therein,
Appellants,
v.

Security Trust Company, a Corporation, Robert Graff, Burroughs Glass Company, a Corporation, Thomas J. Finan, Inc., Corporation, William L. Camp, John H. Wolf, Alton Sheet Metal Corporation, a Corporation, J. and A. Springman, Inc., a Corporation, C. B. Neudecker, Inc., a Corporation, Alden K. Weber and Lester A. Weber, Hadley Dean Glass Company, a Corporation, Marco Sales Incorporated, a Corporation, Melcher Schene Hardware and Lumber Company, a Corporation, Orville W. Maguire, Morgan Llewellyn and Tom De Clue, Appellees.

Appeal from the United States District Court, Southern District of Illinois, Southern Division.

February 4, 1965.

Before Knoch, Castle and Swygert, Circuit Judges.

Knoch, Circuit Judge. This is an appeal from portions of a judgment entered April 15, 1964, which sustained and approved a petition for reorganization under Chapter X of the Bankruptcy Act insofar as it held that Security Trust Company, a corporation, has a provable claim and is entitled to the rights of a petitioning creditor under Chapter X.

The corporate debtor involved is Diversified Development Corporation, an Illinois corporation (sometimes hereinafter called "Diversified"). The petitioning creditors included Security Trust Company, a Missouri banking corporation (sometimes hereinafter called "Security").

Diversified was organized to build a shopping center at Alton, Illinois, for which it obtained a loan from Security in the amount of $800,000 secured by a first mortgage.

In January, 1963, the City Court of Alton, Illinois, appointed a receiver for Diversified. The mortgage loan then being in default, Security filed a separate foreclosure suit in the Circuit Court of Madison County, Illinois, and also petitioned for leave to intervene in the receivership action.

Diversified resisted the foreclosure on the ground that Security was a foreign banking corporation which was not and never could become qualified to transact banking business in Illinois. Judgments were entered in both Illinois courts denying leave to intervene in the receivership case and dismissing the foreclosure action.

Security moved to set aside and vacate these orders but, following the filing of petition in the U. S. District Court to reorganize Diversified, the Circuit Court of Madison County, which also sat as the City Court of Alton, overruled Security's motions, whereupon Security

perfected appeals to the Appellate Court of Illinois for the Fifth District. These appeals have been stayed by the District Court's judgment order of April 15, 1964.

Diversified does not deny that Security lent Diversified $800,000 which has not been repaid. The position of Diversified is that Security's claim is null and void because it arises out of transaction of business in Illinois by a foreign corporation which had not first qualified to do business in Illinois. As a commercial or trading corporation, Security could have cured this defect by subsequent qualification, but such remedy is not available to a foreign banking corporation.

Diversified relies on the following statutory authority:

Ill. Rev. Stat., Ch. 16½, § 106: "No bank shall establish or maintain more than one banking house, or receive deposits or pay checks at any other place than such banking house, and no bank shall establish or maintain in this or any other state or country any branch bank, nor shall it establish or maintain in this State any branch office or additional office or agency for the purpose of conducting any of its business."

Ill. Rev. Stat., Ch. 32, § 157.102 (in part): "A foreign corporation organized for profit, before it transacts business in this State, shall procure a certificate of authority so to do from the Secretary of State. A foreign corporation organized for profit, upon complying with the provisions of this Act, may secure from the Secretary of State a certificate of authority to transact business in this State, but no foreign corporation shall be entitled to procure a certificate of authority under this Act to act as trustee, executor, administrator, administrator to collect, guardian, conservator, or in any other like fiduciary capacity in this State or to transact in this State the business

of banking, insurance, suretyship, or a business of the character of a building and loan corporation. * * *"

Ill. Rev. Stat., Ch. 32, § 157.104 (in part): "No certificate of authority shall be issued to a foreign corporation: * * * (b) Which has as a part of its name any word or phrase which indicates or implies that it is authorized or empowered to conduct the business of banking, * * *."

Ill. Rev. Stat., Ch. 32, § 157.125 (in part): "No foreign corporation transacting business in this state without a certificate of authority shall be permitted to maintain an action at law or in equity in any court of this State, until such corporation shall have obtained a certificate of authority. Nor shall an action at law or in equity be maintained in any court of this State by any successor or assignee of such corporation on any right, claim or demand arising out of the transaction of business by such corporation in this State, until a certificate of authority shall have been obtained by such corporation or by a corporation which has acquired all or substantially all of its assets.

The failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action at law or suit in equity in any court of this State. * * *" (emphasis added.)

Diversified cites *Woods v. Interstate Realty Co.*, 337 U. S. 535 (1949) as authority for its view. In that case the Fifth Circuit held that a Mississippi statute rendering unenforcible in Mississippi the contract of a foreign corporation which had not qualified to do business in Mississippi did not render void the claim for broker's compensation on a sale of real estate in Mississippi. The Fifth

Circuit therefore held further that the doors of a federal District Court sitting in Mississippi would not be closed to the foreign corporate plaintiff.

The U. S. Supreme Court reversed this decision stating that a contrary result would create discriminations against the citizens of a state in favor of those authorized to invoke the diversity jurisdiction of the federal courts.

The Woods case was distinguished in a recent decision in *In re Leeds Homes, Inc.*, 6 Cir., 1964, 332 F. 2d 648, where the Court points out (page 650) that a bankruptcy court does not sit as if it were only another state court; that *Erie RR. Co. v. Tompkins*, 304 U. S. 64, does not apply; and that *Woods*, being a diversity case likewise has no bearing on a federal bankruptcy proceeding. The Sixth Circuit also cites with approval our own decision in *In re V-I-D, Inc.*, 198 F. 2d 392, 396.

Appellant here would distinguish V-I-D as dealing with a commercial or trading corporation which might have qualified subsequent to the transaction out of which Security's claim arose. We do not see this as a valid distinction.

The Illinois statutes and the cases interpreting them clearly indicate that Security's claim although unenforcible in the courts of Illinois is not void. *O'Malley v. Bank of Montreal*, 349 Ill. App. 224, 110 N. E. 2d 473, 474 (1953); *Sternberg Dredging Co. v. Sternberg's Estate*, 351 Ill. App. 514, 115 N. E. 2d 557, 558 (abst.) (1953) app. den. 5 Ill. App. 2d v.

The order of the District Court is affirmed.

Affirmed.

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No. 1129.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1964.

In the Matter of
DIVERSIFIED DEVELOPMENT CORPORATION,
a Corporation,
Debtor.

DIVERSIFIED DEVELOPMENT CORPORATION,
a Corporation, HERMAN WILKENING and
ALICE WILKENING,
Petitioners,

vs.

SECURITY TRUST COMPANY, a Corporation,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

Comes now Security Trust Company, respondent herein, and opposes the petition for a writ of certiorari filed by petitioners Diversified Development Corporation, a corporation, Herman Wilkening and Alice Wilkening.

OPINION BELOW.

Statement in petitioners' brief is correct.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petition.

QUESTION.

Does the respondent have a provable claim which can be asserted and allowed in a bankruptcy proceeding under Chapter X of the Bankruptcy Act?

CONSTITUTIONAL POINT INVOLVED.

Article 1, Section 8, Clause 4 of the Constitution of the United States of America:

> "The Congress shall have power . . . to establish . . . uniform laws on the subject of Bankruptcies throughout the United States."

STATUTORY POINTS INVOLVED.

28 United States Code, Section 1334:

> "The district courts shall have original jurisdiction, exclusive of the courts of the States of all matters and proceedings in bankruptcy."

Illinois Revised Statutes, Chapter 32, § 157.125 (in part):

> ". . . the failure of a foreign corporation to obtain a certificate of authority to transact business in this State shall not impair the validity of any contract or act of such corporation, and shall not prevent such corporation from defending any action at law or suit in equity in any court of this State. . . ."

STATEMENT OF CASE.

The petition is misleading and inaccurate in that:

1. The Illinois State Court did not hold that respondent's claim was invalid. Petitioners' statement that Security had an adverse judgment in the state court "in effect holding void its claim" is inaccurate. The state court did not so hold and the opinions of the reviewing courts of Illinois hereafter cited make it clear that the orders which were entered by the state court cannot be given such effect.

2. The Illinois State Court did not find that respondent had engaged in "the banking business in the State of Illinois." It only found that respondent by making a loan to Diversified "did transact business within the State of Illinois."

3. There has never been a finding by any court that respondent has established a branch office or regional agency in Illinois for the conduct of its banking business nor have petitioners offered any evidence in any proceeding that branch banking is involved in this case in any way.

4. Petitioners suggest that there is a difference in the application of Ill. Rev. Stat., Chap. 32, § 157.125, between foreign commercial and banking corporations but they do not support this suggestion with any decisions or statutes that recognize such a distinction.

5. The petition for reorganization of Diversified Development Corporation was filed by three creditors and the respondent (Appendix, page 5, Cause No. 14648). The petitioners state that respondent joined two creditors in the petition. Further the foregoing creditors were joined by thirteen other creditors who were allowed to intervene in the reorganization proceeding. (Petition for Writ of Certiorari, Appendix page i).

ARGUMENT.

The petition does not comply with the Rules of this court in that it does not refer to any special and important reasons for granting review on writ of certiorari and in fact states no reasons why certiorari should be granted. This court has on two previous occasions, and as recently as October 12, 1964, considered petitions for writ of certiorari involving identical issues as are raised by petitioners herein, and in each instance certiorari was denied. **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952), cert. denied, **Kelley, Glover & Vale v. Kramer**, 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705; **In Re Leeds Homes, Inc.**, 332 F. 2d 648 (6th Cir. 1964), cert. denied, **O. M. Tate, Jr., Trustee, etc. v. National Acceptance Co. of America**, 13 L. ed. 2d 43. The judgments entered by the United States Court of Appeals for the Seventh Circuit are not in conflict with the decisions of another court of appeals, but on the contrary are in accord with the recent decision of the Court of Appeals for the Sixth Circuit, **In Re Leeds Homes, Inc.** Also, the petition requests this court to review the interpretation placed on Illinois statutes on which neither the Illinois or Federal Courts are in disagreement. The petitioners present no new or different questions of law. The Circuit Court of Appeals has not rendered a decision that is in conflict with the applicable decisions of this court.

Under Illinois law a contract made by a foreign corporation not qualified to do business in Illinois although unenforceable in the courts of Illinois, is not void.

Section 157.125 of Chapter 32, Illinois Revised Statutes, applies to a corporation transacting business without a certificate of authority and provides in part:

> "The failure of a foreign corporation to obtain a certificate of authority to transact business in this state **shall not impair the validity of any contract**

> **or act of such corporation,** and shall not prevent such corporation from defending any action at law or suit in equity in any court of this state." (Emphasis added.)

The Illinois Business Corporation Act Annotated, Second Edition, 1947, states, pp. 408, 409:

> "Section 125 was drafted on the following theory: . . . (2) that the acts and contracts of an unlicensed foreign corporation should not be void. . . .
>
> ". . . To meet the second objective, it is provided that the failure of a foreign corporation to obtain a certificate of authority to transact business in this state shall not impair the validity of any contract or act of such corporation."

The Illinois Legislature intended, as the statute clearly provides, that the contract of a non-qualifying corporation is neither invalid or void. The sole effect of the statute is to make the courts of Illinois unavailable to a non-complying corporation. In **O'Malley v. Bank of Montreal,** 349 Ill. App. 224, 110 N. E. 2d 473, 474, suit was filed by depositors against a **foreign bank** not licensed or authorized to do business in Illinois. The court held that contracts of a **foreign banking corporation** not authorized to do business in Illinois are not void but are simply unenforceable by the corporation in the courts of Illinois.

To the same effect are **Sternberg Dredging Company v. Sternberg's Estate,** 351 Ill. App. 514, 115 N. E. 2d 557, 558 (app. denied 5 Ill. App. 2d v.); **Bradford v. Indiana Harbor Belt R. Co.,** 16 F. 2d 836 (7th Cir. 1927); **Metropolitan Opera Ass'n v. Mertopolitan Opera Ass'n of Chicago, Inc.,** 86 F. Supp. 526, 527 (N. D. Ill. 1949).

Petitioners have undertaken in their brief to attribute different meanings to the words "foreign corporation," as they are used in Ill. Rev. Stats. 1961, Ch. 32, Sec. 157.125, although there is nothing in the statute to indicate that any such difference in meaning was intended by

the Illinois Legislature. At page 12, petitioners argue that the first provision of the statute applies to any "foreign corporation" transacting business in Illinois. Thereafter petitioners argue that "foreign corporation" as used in the latter part of the statute means only commercial corporations and does not apply to foreign banking corporations. There is absolutely nothing in the statute to indicate the Illinois Legislature intended that "foreign corporation" should have such application. Had the Illinois Legislature intended so to do it would have so defined its words. Petitioners would require this court to make such a distinction in order to obtain the forfeiture of respondent's claim which they are seeking in this proceeding.

The Illinois statute and those cases which have construed it make it clear beyond any doubt that the statute does nothing more than declare that a contract made by a non-qualifying foreign corporation is unenforceable in the courts of Illinois. The statute does not make such contract void. The provisions of the statute, moreover, make no distinction between a foreign trading or commercial corporation and a foreign banking corporation. The statute has equal application to both. Diversified contends that its mortgage contract with Security is void, although such contention is opposed to the plain provisions of the statute and to the decisions of the Illinois and Federal courts interpreting it.

Irrespective of the repeated statements of petitioners to the contrary, the only question which the circuit court passed on in the foreclosure and receivership actions in the state court was whether respondent could use the state court to enforce its claim under the mortgage of Diversified which it held. Nothing more was decided, and nothing more could be decided. This is so as petitioners premised their motion to dismiss only on the ground that respondent was an unlicensed foreign corpora-

tion transacting business in Illinois, and for such reason could not enforce its claim under Diversified's mortgage in an Illinois court. In the case of **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952), cert. den. **Kelley, Glover & Vale v. Kramer**, 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705, the District Court (101 F. Supp. 71) found the foreign corporation (an Illinois bank) was doing business in Indiana without a certificate of authority. This was precisely the same contention which Diversified and Wilkening made and which the Circuit Court adopted as they contended that Security, a Missouri corporation, was doing business in Illinois and had not obtained a certificate of authority so to do. In the **In Re V-I-D, Inc.**, case, the District Court and the 7th Circuit Court of Appeals decided, however, that even though an Illinois Bank was doing business in Indiana without a certificate of authority, the petitioning creditors had a provable claim under Chapter X of the Bankruptcy Act. Respondent likewise has a provable claim in the Chapter X reorganization proceeding as the creditors in the **In Re V-I-D, Inc.**, case were found to have had.

The Constitution of the United States gives the Congress the exclusive power to establish bankruptcy laws. Article 1, Section 8, Clause 4.

Pursuant to this authority, Congress has determined that the district courts of the United States shall have original exclusive jurisdiction of all matters and proceedings in bankruptcy. 28 U. S. C., Section 1334.

Chapter II, Section 2, of the Bankruptcy Act (11 U. S. C., Section 11 (a) (1)), establishes the original jurisdiction of district courts and provides in the first paragraph thereof that the principal place of business, or residence, of the debtor shall determine which United States District Court sitting in bankruptcy shall have exclusive jurisdiction. No other bankruptcy court in the United States

could have jurisdiction over the matters presented in this reorganization.

There is no question that respondent loaned the sum of $800,000.00 to petitioner Diversified Development Corporation and that the amount due on said loan, the amount allowed in reorganization proceedings, is $918,799.97. To adopt the position urged by petitioners would result in an unconscionable windfall to the petitioners. The bankruptcy court sits as a court of equity and has the obligation to equitably adjust matters involving the debtor's affairs. Equity demands that petitioners not have the benefit of respondent's money and then avoid the obligation in the only court in which respondent could file its claim.

While the case of **Vanston Bondholders Protective Committee v. Green**, 329 U. S. 156, 67 S. Ct. 237, 91 L. ed. 162, is cited by Diversified, the Supreme Court actually held in that case, that a bankruptcy court does not apply the law of the state in which it sits in determining what claims are allowable and how a debtor's assets shall be distributed. The Supreme Court said at page 162:

> "In determining what claims are allowable and how a debtor's assets shall be distributed, a bankruptcy court does not apply the law of the state where it sits. Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, 58 S. Ct. 817, 114 A. L. R. 1487, has no such implication. That case decided that a federal district court acquiring jurisdiction because of diversity of citizenship should adjudicate controversies as if it were only another state court . . . But bankruptcy courts must administer and enforce the Bankruptcy Act as interpreted by this Court in accordance with authority granted by Congress to determine how and what claims shall be allowed and under equitable principles."

In **Prudence Realization Corporation v. Geist**, 316 U. S. 89, 62 S. Ct. 978, 86 L. ed. 1293, the Supreme Court held

that the Bankruptcy Act prescribed its own criteria for distribution to creditors and that Federal and not local law applies to the interpretation and application of Federal statutes. The court said at page 95:

> "The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed . . . and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply Federal law . . ."

In **American Surety Co. v. Sampsell**, 327 U. S. 269, 66 S. Ct. 571, 90 L. ed. 663, cited in **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952, cert. den. 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705) and **In Re Leeds Homes, Inc.**, 332 F. 2d 648, cert. den. 13 L. ed. 2d 43, the court held that certain laborers and materialmen could assert their claims in a bankruptcy court even though their claims could not have been asserted in the California state courts because the claimants had not complied with a state statute which required them to give statutory notice of their claims. The Supreme Court said, page 272:

> ". . . Federal bankruptcy law, not state law, governs the distribution of a bankrupt's assets to its creditors. . . ."

Other cases which hold the allowance of claims in a bankruptcy proceeding is to be decided with reference to the Federal Bankruptcy Act, since such Act is superior to all state laws upon the subject, are **Holmberg v. Armbrecht**, 327 U. S. 392, 66 S. Ct. 582, 90 L. ed. 743; **Moore v. Bay**, 284 U. S. 4, 52 S. Ct. 3, 76 L. ed. 133; **In Re Crosstown Motors, Inc.**, 272 F. 2d 224, 227 (7th Cir. 1959).

Petitioners rely on the case of **Woods v. Interstate Realty Co.**, 337 U. S. 535, 69 S. Ct. 1235, 93 L. ed. 1524. However, they fail to point out to the court that jurisdiction in the **Woods** case was based upon diversity of

citizenship and not bankruptcy. The Sixth Circuit Court of Appeals in its opinion **In re Leeds Homes, Inc.**, 332 F. 2d 648, at page 350 said:

> "The Trustee makes the argument that if the claim would not be enforced in the state court then, under the Erie doctrine, Erie R. R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, it should not be enforced in a federal court sitting in that state. In support of this proposition, the Trustee cites Woods v. Interstate Realty Co., 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524. This argument overlooks the fact that jurisdiction in the instant case is based on federal bankruptcy law and not on diversity of citizenship. Thus a bankruptcy court does not sit 'as if it were only another state court', and Erie does not apply. Vanston Bondholders Protective Committee v. Green, 329 U. S. 156, 162, 67 S. Ct. 237, 240. Similarly, Woods v. Interstate Realty Co., supra, being a diversity case, has no bearing on this case. In re V-I-D, Inc., 198 F. 2d 392, 396 (C. A. 7), cert. denied, Kelley, Glover & Vale v. Kramer, 344 U. S. 914, 73 S. Ct. 337, 97 L. Ed. 705."

The Seventh Circuit Court of Appeals in the **In Re V-I-D** case, 198 F. 2d 392, said at page 396:

> "The objector here insists that the decision in Woods v. Interstate Realty Co., 337 U. S. 535, 69 S. Ct. 1235, 93 L. Ed. 1524, is decisive of this question, . . . We think it is clear that the Woods case has no bearing on the question with which we are here confronted . . . It is also true that the decisions of the Mississippi courts held that such a contract was not void but only unenforceable in the courts of that state. There, however, the jurisdiction of the federal court was invoked on grounds of diversity of citizenship. The case, therefore, held, as did Erie Railroad Co. v. Tompkins, that in diversity cases the

federal court could not entertain a suit to which the state had closed its courts. As we have shown in the quotations from the Supreme Court decisions cited above, bankruptcy courts were created by Congress for the purpose of administering bankruptcy matters and are governed by federal law. A bankruptcy court does not sit 'as another state court' and is not governed by state laws. It orders distribution to creditors according to the criteria prescribed by the Bankruptcy Act., 11 U. S. C. A., § 1 et seq."

The petition suggests that respondent was guilty of some impropriety in connection with an injunction which stayed actions pending in the state courts of Illinois. The injunction, however, was mandatory. Section 148 of the Bankruptcy Act (11 U. S. C. 548) provides:

"Until otherwise ordered by the judge, an order approving a petition shall operate as a stay of a prior pending bankruptcy, mortgage foreclosure, or equity receivership proceeding, and of any act or other proceeding to enforce a lien against the debtor's property."

The decisions of this court in **Vanston Bondholders Protective Committee v. Green**, 329 U. S. 156, 67 S. Ct. 237, 91 L. ed. 162; **American Surety Co. v. Sampsell**, 327 U. S. 269, 66 S. Ct. 571, 90 L. ed. 663; **Prudence Realization Corp. v. Geist**, 316 U. S. 89, 62 S. Ct. 978, 86 L. ed. 1293; **In Re V-I-D, Inc.**, 198 F. 2d 392 (7th Cir. 1952), cert. denied, **Kelley, Glover & Vale v. Kramer**, 344 U. S. 914, 73 S. Ct. 337, 97 L. ed. 705; and **In Re Leeds Homes, Inc.**, 332 F. 2d 648 (6th Cir. 1964), cert. denied, **O. M. Tate, Jr., Trustee, etc. v. National Acceptance Co. of America**, 13 L. ed. 2d 43, are controlling in this proceeding.

There is no compelling reason why this court should grant certiorari when the question involved has been

settled by prior decisions of this Court in refusing to review the correct decisions of the Sixth and Seventh Circuit Courts of Appeal.

CONCLUSION.

As the exclusive jurisdiction of bankruptcy matters is given to the district courts of the United States and as the law of the State of Illinois does not invalidate respondent's claim, the decisions of the District Court and the Circuit Court of Appeals are correct. Respondent respectfully submits that the petition does not meet this court's standards for review on a writ of certiorari and prays that this Honorable Court deny said petition.

Respectfully submitted,

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